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PRESCRIPTION.

In *Corporation of Sherbrooke & Dufort*, M.L.R., 5 Q.B. 266, the Court of Appeal dismissed the action upon the three months' limitation under C.S.C. ch. 85, s. 3, which was not pleaded, but was invoked on the appeal. Mr. Justice Tessier, who dissented, referred to the case of *Carter & Breakey*, (A. D. 1884) Ramsay, 547, which states that the Court of Appeals modified the judgment, but did not supply the defence of prescription. And it is added, "In the Supreme Court, this judgment was reversed by allowing a higher rate of value for the use and occupation of the land, but the defence of prescription was not supplied." We have reason to believe that this note was based upon inaccurate information, and that the abstract of *Carter & Breakey* in Cassels, 256, is correct. It must be remembered that Mr. Justice Ramsay's Index was an unfinished draft, at the time of his death. If the lamented author had lived to complete the thorough revision which he intended to give the work as it was passing through the press, this and other inaccuracies which may be observed in it, would probably have been rectified.

Mr. Justice Bossé, in giving the judgment of the Court in *Corp. of Sherbrooke & Dufort*, refers to the case of *Lamontagne & Dufresne*, (A.D. 1874), Ramsay, 545. The holding in this case, according to Mr. Justice Ramsay, was as follows:—"Prescription must be pleaded in all the cases mentioned in articles 2250, 2260, 2261, and 2262, C.C., the right of action in these cases not being 'denied.'"

The action in the last mentioned case was brought by Dufresne *et al.* against Lamontagne to resiliate a lease for fifteen years from Laurent Dufresne to the defendant Lamontagne. The action also included a demand for eight and a half years' rent. Prescription was not pleaded, and the judgment of the Superior Court, Torrance, J., July 9, 1873,

makes no reference to it. The demand was maintained, the *considérant* being as follows:

"Considérant que le défendeur Lamontagne a failli de faire la preuve des allégations contenues dans ses exceptions et défenses par lui plaidées à cette action, déboute les dites exceptions et défenses, sauf quant aux primes d'assurance, et condamne le dit défendeur Charles H. Lamontagne à payer aux dits demandeurs la somme de \$524, étant pour dix-sept semestres de loyer des prémisses mentionnées en la déclaration en cette cause, dus et échus le 1er novembre 1871, etc." The lease was also rescinded.

Lamontagne appealed from this judgment, Mr. D. D. Bondy for appellant. The *factum* discusses various questions with great vivacity, and on the last page we find the following reference to the question of prescription: "Enfin, en se limitant à la prescription qui est le dernier port de refuge de l'appellant, et dans lequel, armé de la loi qu'on ne l'accusera pas, il l'espère, d'avoir forgée, il défie tous les attaques haineuses et impuissantes de ses adversaires ennemis, il ne resterait dû en définitive aux intimés qu'une somme totale de \$354."

Messrs. Duhamel, Rainville & Rinfret represented the respondents, Mr. Joseph Doutre, Q.C., appearing as counsel. The question of prescription is noticed in the respondents' *factum* in the following terms:—

"La prescription de cinq ans, contre les arrérages d'un bail emphytéotique n'existait pas avant la Code. Voir texte officiel de l'art. 2250, qui est inclu entre []. De même, l'art. 2267 est entre []. Et l'art. transitoire 2270 réserve les prescriptions commencées avant le Code; ce qui veut dire que les contrats soumis à des prescriptions différentes de celles créées par le Code, continuent à être régis par le droit antérieur. D'ailleurs, dans le cas actuel, les demandeurs sont créanciers solidaires, et la prescription, interrompue ou suspendue pour l'un d'eux, l'était pour tous. C.C. Art. 2230. L'art. 2232 introductif d'un droit nouveau suspend néanmoins la prescription à l'égard des mineurs. Or ici il y a nombre de mineurs.

"De plus, la prescription (Art. 2188) n'est pas suppléée par le juge. Ici elle n'est pas